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February 25, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 2, 2004

Case No.: TIA-0152

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

*I. Background*

**A. The Energy Employees Occupational Illness Compensation Program Act**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.<sup>1</sup>

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as an electrical mechanic and supervisor at DOE's Paducah Gaseous Diffusion Plant. The Applicant worked at the site for 42 years, from 1952 to 1994.

The Applicant filed an application with OWA, requesting physician panel review of 3 illnesses - colon cancer, hearing loss, and cornea transplant.

The Physician Panel rendered a negative determination on three illnesses - colon cancer, hearing loss, and cataracts. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

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<sup>1</sup> [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy)

In his appeal, the Applicant does not challenge the determinations for colon cancer and hearing loss. Instead, the Applicant appeals the determination on cataracts. The Applicant argues that the Panel did not fully consider his ocular claims. The Appellant states that those claims included endothelial dystrophy and a cornea transplant. In addition, the Applicant maintains that the Panel understated his exposures.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We agree with the Applicant's contention that the Panel did not fully consider his ocular claims. The record indicates that the Applicant claimed that toxic exposures to his eyes while working at Paducah led to his poor vision and resultant conditions of cataracts and endothelial dystrophy, and a cornea transplant. He listed cornea transplant on his application and then supplemented that claim to specify poor vision resulting in cataracts and endothelial dystrophy. OWA Record at 24, 662, 694. Accordingly, those claims should have been considered.

We also agree that the Panel understated the Applicant's exposures. The Panel described his radiation exposures as consistently below harmful levels. In doing so, the Panel failed to discuss numerous incidents in the OWA record. As indicated by the Applicant in his Appeal, the record shows the Applicant to have been placed on restrictive duty because of elevated levels of uranium in his urine. OWA Record at 123, 377-380. In addition, the Panel failed to mention exposures to UF6 gasses and multiple incidents of flash burns in the eyes from hydrofluoric acid. OWA Record at 4, 274. Because the Panel apparently overlooked the foregoing exposures, further consideration of the claim is warranted.

In summary, further review of this case should focus on the identified ocular conditions of poor vision, cataracts, and endothelial dystrophy, and resultant cornea transplant surgery.

The documented elevated uranium levels and exposures to hydrofluoric and UF<sub>6</sub> gasses should also be considered.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0152 be, and hereby is, granted.
- (2) The Physician's Panel Report did not consider all of the claimed eye conditions and understated the Applicant's exposure to toxic substances. Reconsideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: February 25, 2005